ORIGINAL
FILE

BARAFF, KOERNER, OLENDER & HOCHBERG, P.C.

ATTORNEYS AT LAW

5335 WISCONSIN AVENUE, N.W., SUITE 300

WASHINGTON, D.C. 20015-2003

(202) 686-3200

B. JAY BARAFF
ROBERT L. OLENDER
JAMES A. KOERNER
PHILIP R. HOCHBERG
AARON P. SHAINIS
LEE J. PELTZMAN
MARK J. PALCHICK
JAMES E. MEYERS

OF COUNSEL
ROBERT BENNETT LUBIC

FAX: (202) 686-8282

January 4, 1993

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N. W.
Washington, D. C. 20554

Re: MM Docket No. 92-259
Comments of TKR Cable Company

Dear Ms. Searcy:

Transmitted herewith on behalf of TKR Cable Company, are an original and nine copies of its Comments in the above-referenced proceeding.

Should you have any questions, please contact the undersigned.

Very truly yours,

James E. Meyers

James E. Meyers
Counsel for
TKR Cable Company

Enclosures

JEM/fb\20200\Searcy2.ltr

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Cable Television	)	
Consumer Protection and Competition	)	MM Docket No.
Act of 1992	)	92-259
	)	
Broadcast Signal Carriage Issues	)	

To: The Commission

COMMENTS OF TKR CABLE COMPANY

TKR CABLE COMPANY

James E. Meyers
Mark J. Palchick
B. Jay Baraff
Its Counsel

Baraff, Koerner, Olender
& Hochberg, P.C.
5335 Wisconsin Avenue
Suite 300
Washington, D.C. 20015
(202) 686-3200

January 4, 1993

TABLE OF CONTENTS

SUMMARY

As a First Amendment speaker, TKR questions the lawfulness of Sections 4, 5 and 6 of the 1992 Cable Act, and, therefore, the lawfulness of any regulations promulgated under those sections. TKR submits its comments without waiving its First Amendment rights. The Commission should recognize the constitutional rights of cable operators and extend them the First Amendment "benefit of the doubt" in promulgating the proposed regulations.

Cable operators should be allowed to redesignate their principal headend from time-to-time as circumstances warrant so long as there is a rational business/technical reason for the system's actions. If such a reason exists, it should be concluded, prima facie, that there was no intent to circumvent must-carry obligations.

"Substantial" duplication of programming on both non-commercial educational ("NCE") and commercial stations should be subject to the same test and applied uniformly for aid of administration. Substantial duplication should be based on both a primetime and daily schedule basis. Television stations should be considered substantially duplicating if they contain either more than 50% of the other's weekly primetime programming or more than 50% of the other's daily schedule, based on the station with the shorter broadcast day. The daily duplication standard

should include programming presented on both the day before and the day after its broadcast by the duplicating station.

Cable operators should not be required to respond in writing to requests to identify NCE must-carry stations. The cable operator should have the flexibility to effect compliance in whatever cost-effective manner its operations permit. In no event should the cable operator be given less than 45 days to respond to any such requests in order to permit the opearator to process any such requests and place a response in the subscriber billing cycle, as might be appropriate as a follow-up to carriage or channel position changes. Cable operators should be given this same discretion with respect to commerial must-carry stations.

Cable operators likewise should have flexibility in providing notice to both new and existing subscribers of which must-carries, if any, require a converter to be received over additional outlets (if the cable operator permits the subscriber to install additional receiver connections). In offering to sell or lease a "converter box", cable operators should be permitted to make sure the subscriber is aware of the adequacy of his or her cable-ready equipment, if that is the case, in order to avoid the expense of unnecessary equipment.

Because of ever-increasing frequency with which cable systems are reconfiguring and technically integrating, cable operators should be allowed to determine which market their

systems are located based on where the principal headend is located; or where its subscribers are located; or where the physical system extends. So long as the cable operator has a rational business/technical reason, it should be permitted to make a market determination that would be applicable to the entire physical system or portions of it. Likewise, technically integrated cable systems serving communities in more than one ADI should be permitted to determine their market(s).

TKR agrees with the Commission that current ADI data are appropriate, but suggests a three year update cycle to avoid disruption.

TKR agrees that the Cable Act does not specify which parties may make requests for market changes, but notes that the legislative history contemplates only cable operators making such requests. In considering requests for market changes, the Commission should take into account both distance and viewership.

The program exclusivity rules should be amended to exempt signals carried pursuant to must-carry or elective retransmission consent.

Cable operators that do not have adequate reception and processing equipment to carry television broadcast transmissions in the vertical blanking interval or aural baseband do not have the technical feasibility to carry such material contained in the vertical blanking interval or

subcarriers of broadcasters as required under the 1992 Act, even if the cable operator has the capability to utilize the vertical blanking interval and/or subcarriers on non-broadcast channels, and the Commission should recognize this.

TKR agrees with the Commission's assessment that "on-channel" carriage is necessarily limited by the number of channels comprising the "basic service tier".

Cable operators should not be required to provide subscribers notice of the deletion or repositioning of commercial must-carry signals. The statute does not require it.

Cable operators should be given at least 30 days to respond to stations' must-carry complaints. Television stations, commercial and NCE, should be required to file a complaint within 30 days of the cable operators' response to the station's notice, as suggested by the Commission.

Retransmission consent should apply to SMATV facilities. Retransmission consent elections should be timed so that elections will become effective at the end of the Copyright Statement of Account accounting period following 120 days from the date of the election. This timeframe will permit cable operators to limit any signal carriage adjustments to as few as possible while avoiding unwarranted copyright costs.

There should be no default procedure for stations that fail to make a must-carry or retransmission consent

election, unless the cable operator is permitted to make such an election.

TKR agrees that cable systems should be given must-carry credit for the carriage of any station pursuant to a retransmission consent election.

TKR believes that the Commission should be involved in the resolution of retransmission consent disputes. A potential violation of Section 325 by the cable operator is involved in any retransmission consent dispute. The Commission has the unique and singular experience of dealing with the complex carriage rules under its primary jurisdiction.

Although TKR agrees that retransmission fees are and should be permissible costs to be factored into an appropriate basic service tier rate in the Section 3 rule making, those fees should not be justifiable merely because they can be "passed through" to subscribers. The Commission should investigate, upon complaint, retransmission consent fees. Unreasonable discrimination among cable systems in the station's service area likewise should be suspect. Otherwise, cable subscribers would be required to subsidize virtual windfalls to broadcasters.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-259
	)	
Broadcast Signal Carriage Issues	)	

To: The Commission

COMMENTS OF TKR CABLE COMPANY

I. Introduction

TKR Cable Company ("TKR"), through undersigned counsel, submits its comments to the Notice of Proposed Rule Making in the above-captioned proceeding, FCC 92-499 ("Notice"). TKR is a multiple system operator and engages in "speech" fully protected by the First Amendment.[1]

As a First Amendment speaker, TKR questions the lawfulness of sections 4, 5 and 6 of the 1992 Cable Act, and, perforce, the lawfulness of any regulations promulgated under those sections. Without waiving its First Amendment rights (or any other of its rights), TKR submits the following in response to the Notice.

---

[1]Cf., Century Communications Corp. v. FCC, 835 F.2d 292 (D.C. Cir.), clarified, 837 F.2d 517 (D.C. Cir. 1987), cert. denied, 486 U.S. 1032 (1988); Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985), cert. denied, 476 U.S. 1169 (1986).

II. The Regulations Must Be Crafted in Deference to Cable Operators' First Amendment Rights

In the legislative history of the 1992 Cable Act, Congress recognized and attempted, indeed extensively, to reconcile the First Amendment rights of cable operators with the Act's must-carry provisions. H. Rep. 102-628, 102d Cong., 2d Sess. (June 29, 1992)("House Report") at 58-74, approved H. Rep. 102-802, 102d Cong., 2d Sess. (September 14, 1992) ("Conference Report") at Cong. Rec. H8325-27 (September 14, 1992). The Commission must likewise recognize the constitutional rights of cable operators and utilize its unique experience and expertise, in the First Amendment used must-carry to extend to them the First Amendment "benefit of the doubt" in promulgating regulations pursuant to sections 4, 5 and 6 of the 1992 Cable Act.

III. Non-Commercial, Educational ("NCE") Must-Carry

A. Qualified Local NCE Stations

1. Municipal NCE Stations

The Commission's proposal (Notice at para. 8) to require municipal NCE stations to transmit predominantly noncommercial programs for educational purposes for at least 50 percent of their broadcast week should be clarified to reflect specifically that the measurement is to be made in terms of broadcast hours, as mentioned in the House Report at 104.

2. Designation of Principal Headend

TKR agrees with the Commission's proposal (Id.) that so long as there is no intention to circumvent must-carry obligations, cable operators with multiple headend facilities should be allowed to choose their principal headends. Cable operators should be allowed to redesignate their principal headends from time-to-time as circumstances warrant (such as in the case of system rebuilds, upgrades, or reconfigurations) so long as there is a rational business/technical reason for the system's actions. If such a reason exists, it should be concluded, prima facie, that there was no intent to circumvent must-carry obligations.

B. Duplicate Programming on NCE Stations

For ease of administration and compliance, the Commission should use the same definition for "substantially duplicate(s)" station programming with respect to State public television network affiliates as well as with respect to any additional NCE stations required to be carried on systems with more than 36 channels. See sections 615(b)(3)(C) and 615(e). See also Notice at paragraphs 10-12. The definition of substantial duplication should contain both prime time and all-day schedule comparisons. Duplication need not be simultaneous. NCE stations should be considered substantially duplicating if they contain either more than 50 percent of the other's weekly prime time programming (as proposed at Notice, paragraph 12) or more

than 50 percent of the other's daily schedule, based on the station with the shorter broadcast day. The daily duplication standard should include programming presented on both the day before and the day after its broadcast by the duplicating station.

C. Identification of NCE Must-Carries

Cable operators should not be required to respond in writing to requests to identify NCE must-carry stations or to keep a list of such signals in their public files (See Notice at paragraph 14). The cable operator runs the risk of non-compliance with this Cable Act requirement and should have the flexibility to effect compliance in whatever cost-effective manner its operations permit. For example, customer service representatives could be provided the channel information to provide to callers making oral requests, thereby effecting meaningful compliance. On the other hand, a written response to a written request may be appropriate, as may be the providing of the information periodically over the cable system. In no event should the cable operator be given less than 45 days to respond to any such request. (45 days would permit the operator to process any such requests and place a response in the subscriber billing cycle, as might be appropriate as a follow-up to carriage or channel position changes.)

IV. Commercial Station Must-Carry

A. Notification and Additional Set Requirements

Cable operators should be permitted to respond to requests for identification of commercial must-carry stations in the same manner as for NCE must-carry stations, discussed above. (See Notice at paragraph 16.) Cable operators should likewise have flexibility in providing notice to both new and existing subscribers of which must-carries, if any, require a converter to be received over additional outlets (if the cable operator permits the subscriber to install additional receiver connections). Such notice may be accomplished, for example, with literature included in the materials provided to new subscribers, with inclusions in monthly billings of existing subscribers or with notices over the cable system.

In offering to sell or lease a "converter box," a cable operator should be permitted to make sure that the subscriber is aware of the adequacy of his or her cable-ready equipment, if that is the case. In that way, cable operators and cable subscribers can avoid the expense of unnecessary equipment.

B. Definition of Local Commercial Station

1. Location of the Cable System

Because of the ever-increasing frequency with which cable systems are reconfiguring and technically integrating, cable operators should be allowed to determine in which

market their systems are located based on where the principal headend is located; or where its subscribers are located; or where the physical system extends. So long as the cable operator has a rational business/technical reason, the cable operator should be permitted to make a market determination that would be applicable to the entire physical system or, if inconsistent carriage obligations are acceptable to the cable operator, to portions of the physical system.[2] (See Notice at paragraph 17.)

2. Definition of a Television Market

a. Technically Integrated Systems

Operators of technically integrated cable systems that serve communities in more than one ADI should be permitted to determine their market(s) as discussed above. (See Notice at paragraph 18.)

b. ADI Data

While TKR agrees with the Commission that current ADI data are appropriate (Id. at paragraph 21 and footnote 23), the Commission should consider ADI updates on the same basis as the section 76.51 list, e.g., every 3 years. (Id. at paragraph 22.) In that way subscribers and cable operators will not be unnecessarily inconvenienced. A three year update will also "protect" new stations commencing

[2]The Commission should clarify that, where a cable operator has not accepted inconsistent carriage obligations, "partially distant" signals for copyright calculations are subject to the requirements of section 614(b)(10)(B) for carriage on the system.

operations in the interim from the anomalies associated with data that no longer reflect market realities.

c. Requests for Market Changes

With respect to the Commission's proposal to permit both broadcasters and cable operators to request that the Commission add or subtract communities from ADI markets (see Notice at paragraph 19), TKR agrees that the 1992 Cable Act does not specify which parties may make such requests. TKR notes, however, that the legislative history concerning requests for market changes contemplates only cable operators making such requests. See House Report at 98.

In considering requests for market changes, the Commission should take into account both distance and viewership. Thirty-five miles is not too restrictive a threshold for the distance factor in light of its historic must-carry significance, its copyright significance and its significance under Subpart F of Part 76. The Commission's significantly-viewed standard for independent stations (2 share; 5 net weekly circulation) under section 76.54(b) is also a reliable viewership measuring tool which should be a factor, particularly in light of its use in Section 76.33 to determine signal availability.[3]

---

[3]TKR recognizes that less-than "significant" viewership can be measured to establish a station's over-the-air viewability, so long as the station registers a rating and a net weekly circulation pursuant to acceptable survey sampling and methodology.

d. Program Exclusivity Rules

TKR shares the Commission's concern over the situation where a station entitled to must-carry can at the same time be subject to deletion of some portion of its programming because of applicable exclusivity and non-duplication rules. See Notice at paragraph 23. This phenomenon is particularly malevolent in the case of the out-of-ADI, uncarried network affiliate. By invoking its network nonduplication rights, such a station can prevent subscribers from receiving the programming of the must-carry affiliate and can negatively affect basic tier rates by commanding extraordinary retransmission consent fees in order for subscribers to have the network programming available to them over the system. Accordingly, the Commission should amend its program exclusivity rules to provide an additional exemption for signals carried pursuant to must-carry or elective retransmission consent.

3. Duplicating Signals and Networks

The Commission should apply the same criteria for determining duplicating programming for commercial stations as for NCE stations, discussed above. Duplication need not be simultaneous and should employ both a prime time and all day schedule comparison, with duplication of more than 50 percent of either constituting substantial duplication, measuring from the station with the shortest broadcast day. The daily duplication standard should include programming

presented the day before or the day after its broadcast by the duplicating station. See Notice at paragraph 25 and Section III.B., supra.

Network affiliates should be limited to ABC, CBS and NBC which is consistent with the definition of network stations for purposes of calculating copyright compulsory license fees.

V. Provisions for Both Commercial and NCE Stations

A. Manner of Carriage

Sections 614(b)(3)(A) and 615(g)(1) are virtually identical, not warranting different requirements on cable operators with respect to commercial and NCE stations once the signal has been collected by the cable system's antenna. (See Notice at paragraph 32.) The cable operator should be allowed to process both commercial and NCE signals in the same manner in order to ensure, uniformly, the highest quality signal retransmission. So-called "enhancements" or "ghost cancelling" techniques employed by the cable system should be utilized in lieu of any such transmission characteristics contained in the signal, if such techniques will improve or not detract from signal quality.

Where the cable operator does not utilize vertical blanking intervals and/or subcarriers, it should not be required to retransmit such material as contained in broadcast signal transmissions, regardless of whether program-related or, in the case of NCE stations, for the

receipt of programming for the handicapped or for educational or language purposes. Only if the cable operator utilizes subcarriers or the vertical blanking intervals and if the system has adequate reception and processing equipment should such carriage be considered technically feasible.

B. Channel Positioning

TKR agrees with the Commission's assessment that "on-channel" carriage is necessarily limited by the number of channels comprising the "basic service tier." (Notice at paragraph 33.) Aside from the technical and cost difficulties in attempting to "tier around" specific channel positions, the 1992 Cable Act contemplates that cable operators have discretion in establishing their basic service tier offerings. See, e.g., section 623(b)(7).

In attempting to fulfil channel positioning requirements, cable operators should be permitted to take reasonable measures to minimize disruption to consumers, such as simultaneously implementing all channel shifts to the extent possible.[4]

---

[4]As discussed in the following text on retransmission consent, any change in cable system lineups is expensive and disruptive. Consumers generally prefer their cable channel offerings to remain stable.

C. Procedural Requirements

1. Notice of Channel Repositioning

Cable operators should not be required to provide subscribers notice of the deletion or repositioning of commercial must-carry signals. (Notice at paragraph 37.) The statute does not require it. Moreover, the 1992 Cable Act attempts to identify different concerns with respect to NCE must-carry than with respect to commercial must-carry.

2. Remedies

Cable operators should be given at least 30 days to respond to stations' must-carry complaints. The Commission's proposed 10 days is insufficient to adequately respond in light of the operational realities of most cable systems, including the need in many cases to seek counsel on the rule at issue. (Notice at paragraph 39.) The public is typically afforded 30 days to file petitions to deny proposed Commission grants. Cable operators' with First Amendment rights at stake should be afforded no less.

Television stations, commercial and NCE, should be required to file a complaint within 30 days of the cable operator's response to the station's notice as suggested by the Commission. (Id.) Inasmuch as a station must request must-carry to be entitled to it, a broadcaster may similarly waive must-carry, and the Commission would have jurisdiction in implementing must-carry to take circumstances of waiver into account.

VI. Retransmission Consent

A. SMATVs as Multichannel Distributors

The definition of "multichannel video programming distributor" includes satellite master antenna systems (See Notice at paragraph 42). New section 522(12) does not limit the types of facilities that fall within its definitional ambit. Moreover, the Senate Report (at page 71) which reported the section as enacted states:

> Examples of multichannel video programming distributors include wireless cable and satellite master antenna television

(Emphasis added). Accordingly, SMATVs must be recognized as multichannel video programming distributors in the application of retransmission consent.[5]

B. Timing of Election

Because cable operators are susceptible to full (i.e., non-pro-rated) copyright liability for signals carried at any time during the semi-annual accounting periods (January 1 through June 30 and July 1 through December 31), the implementation of retransmission consent elections should coincide with the final day of an accounting period. In

---

[5]TKR notes that the Copyright Office regognizes SMATVs as cable systems and has extended the cable compulsory license to them. See, e.g., Notice of Proposed Rulemaking, Cable Compulsory License; Definition of Cable Systems, Docket No. RM86-7B, 56 Fed. Reg. 31580 (July 11, 1991). Moreover, the Commission recognizes SMATVs as multichannel facilities providing "effective competition" to cable under Section 76.33, and Section 11 limits circumstances of cable system/SMATV cross ownership, further recognizing that the two types of multichannel video distribution programming distribution facilities provide competition to one another.

order to effect a smooth transition and administration, no distinction should be made between new stations and existing stations in this regard. All stations' elections should take effect at the end of the accounting period in which the 120th day after the election occurs. (See Notice at paragraphs 50-52 and the Commission's proposal at paragraph 52 to provide new stations with a 60 day implementation period.)

The 120 day benchmark to determine the accounting period, the end of which would coincide with the implementation of the election, is a realistic time frame in light of the number of signals involved. Cable operators will know their future signal carriage obligations sufficiently in advance to provide the required notices and effect any operational changes at the end of the accounting period, thereby minimizing consumer disruption and copyright liability. Moreover, broadcasters carried at the time of election will have continued carriage and likely the opportunity to finalize arrangements. Subsequent retransmission consent elections would occur on the respective triennial anniversary date (i.e., October 6) with the triennial implementation anniversary staggered accordingly. Otherwise, implementation could occur sooner based on the mutual agreement of the station and the cable operator.

C. Notification and Default

Cable systems should be notified of retransmission consent elections in writing as proposed. See Notice at paragraph 51. The Commission should not impose a default election procedure, particularly if such a procedure would act as a surrogate to making an election (e.g., the Commission should not deem a station in default as having elected for must-carry), unless the cable operator is allowed to make the default election.

Should a station fail to make the election, the system should not be penalized for continuing to carry the station or for deleting the station. In prescribing the consequences to a station and cable operator of the station's failure to make an election, the Commission should provide deference to the cable system's then-current channel lineup and scheduled channel plans (including, for example, continued carriage of the station if faced with an after-the-fact retransmission consent election or vice-versa). Cable system lineups and consumer tolerance are too fragile to accommodate the back-and-forth of a Commission policy that is lenient with dilatory stations. As discussed above, it costs between approximately $5,000 to $10,000, depending on the size of the system, to change channel lineups and positions.

D. Must-Carry Credit

TKR agrees with the Commission's tentative conclusion that carriage of local commercial television stations pursuant to retransmission consent counts towards meeting commercial station must-carry requirements. See Notice at paragraph 54. TKR further agrees with the Commission that Section 614(b) applies only to local commercial television stations being carried pursuant to must-carry or a must-carry election. Id. at paragraph 56. TKR likewise agrees that section 76.62 does not require amendment (Id. at paragraph 60) and that there should be no minimum quantum of carriage of a local commercial television station pursuant to retransmission consent to obtain must-carry credit (Id. at paragraph 61). The literal language of the Act permits the Commission's tentative conclusions and they are consistent with the framework and intent of the Act.

E. Retransmission Consent Agreements

TKR believes that the Commission should be involved in the resolution of retransmission consent disputes. A potential violation of section 325 by the cable operator is involved in any retransmission consent dispute. Moreover, the process of entering retransmission consent agreements may be impeded if enforcement is left to the courts. As the agency with primary jurisdiction to implement must-carry and retransmission consent, and with the unique and singular experience of dealing with the complex carriage rules, it

does not appear that it would serve the public interest for the Commission to delegate this responsibility.[6]

F. Reassertion of Rights

TKR is not opposed to the result of the Commission's proposal that where a local station has not asserted its retransmission consent rights and is being carried above the system's must-carry quota, the signal should be treated as a must-carry signal. Notice at paragraph 63. This situation, however, may be contrary to the must-carry and retransmission consent interrelationship. It seems to assume that stations have retransmission consent rights prior to October 6, 1993. Moreover, since there is no corresponding statutory provision to the Conference Report for changes in election, no interpretation is required or necessarily desirable. As discussed above, there should not be default election procedures (unless the cable operator is permitted to make the default election), much less identified circumstances wherein the broadcaster may change its election without the cable operator's consent, contrary to the statute.

G. Reasonableness of Rates

TKR disagrees with the Commission's approach to merely relegate the reasonableness of retransmission consent fees to the rate regulation proceeding under section 3. See

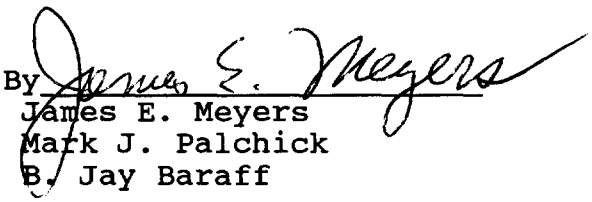
---

[6]The Commission could explore the extent appropriate to utilize its Alternative Dispute Resolution process to oversee this aspect of retransmission consent administration.

Notice at paragraph 69. Although TKR agrees that retransmission consent fees are and should be permissible costs to be factored into an appropriate basic service tier rate in the section 3 rule making, those fees should not be justifiable merely because they can be "passed through" to subscribers. The Commission should investigate, upon complaint, retransmission consent fees. Unreasonable discrimination among cable systems in the station's service area likewise should be suspect along the guidelines established in section 19. Otherwise, cable subscribers will be required to subsidize virtual windfalls to broadcasters.

Respectfully submitted,

TKR CABLE COMPANY

By 
James E. Meyers
Mark J. Palchick
B. Jay Baraff

Its Counsel

Baraff, Koerner, Olender
& Hochberg, P.C.
5335 Wisconsin Avenue
Suite 300
Washington, D.C. 20015
(202) 686-3200